

# EUROPEAN PRICING SYSTEM FOR WATER SERVICES AS AN INSTRUMENT FOR SHAPING THE PRINCIPLE OF COST RECOVERY AND THE POLLUTER PAYS PRINCIPLE

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## INTRODUCTION

The entry into force of the Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy<sup>1</sup> (hereinafter: “the WFD”) is referred to in the literature as a Copernican revolution in water policy,<sup>2</sup> and the WFD itself is referred to as the “next-generation directive”,<sup>3</sup> as it has created a common framework to coordinate and partially replace existing legislation. At the same time, we cannot lose sight of the fact that the provisions of the WFD, in particular paragraphs 19 and 20 of the preamble, indicate that it primarily regulates water quality management and that quantitative water management is of a subsidiary nature.<sup>4</sup> Action at European Union (hereinafter: “EU”) level is aimed at transforming water policy into a comprehensive

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<sup>1</sup> Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, pp. 1–73.

<sup>2</sup> Morgera, E., ‘Water Management and Protection in the EU’, in: *Environmental protection in multi-layered systems*, Leiden, 2012, pp. 265–287.

<sup>3</sup> Liefferink, D., Wiering, M., Uitenboogaart, Y., ‘The EU Water Framework Directive: a multi-dimensional analysis of implementation and domestic impact’, *Land Use Policy*, 2011, No. 28(4), pp. 712–722.

<sup>4</sup> Aubin, D., Varone, F., ‘The Evolution of European Water Policy’, in: *The evolution of national water regimes in Europe*, Kluwer, 2004, pp. 49–86; Aubin, D., Varone, F., *European Water Policy, A path towards an integrated resource management*, Louvain-la-Neuve, 2002, pp. 1–27.

policy and thus integrating water management as a cross-cutting element into other policy areas closely related to water resources, such as human consumption, energy, agriculture, fisheries, tourism, environment. Such a development of legal relations in water management should only enhance the effective implementation of the precautionary principle and the polluter pays principle, which should continue to be applied as a starting point in the field of water policy.<sup>5</sup>

A key instrument of the WFD is river basin management: the Member States must define river basins on their territory, assign them to river basin districts and establish river basin management plans for those river basin districts. The WFD river basin management objective is to achieve good status for all surface and groundwater bodies in the EU.<sup>6</sup>

The WFD ensures full economic and environmental integration of water quality and quantity management within the EU. Its main objective is to achieve by 2015 (with the possibility to extend this deadline until 2027 – Article 4(4) of the WFD) a good status of more than 111 000 surface waters (e.g., rivers, lakes, coastal waters) and more than 13 000 groundwater bodies within the EU.<sup>7</sup> The intent of the WFD is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which: a) prevent further deterioration, protect and improve the status of aquatic ecosystems and, in relation to their water needs, terrestrial ecosystems and wetlands directly dependent on aquatic ecosystems; b) promote sustainable use of water based on the long-term protection of available aquatic resources; c) pursue enhanced protection and improvement of the aquatic environment, inter alia, through specific measures for the progressive reduction of discharges, emissions and losses of priority substances and the cessation or phasing out of discharges, emissions and losses of priority hazardous substances; d) ensure a gradual reduction of pollution of groundwater and prevent further pollution,

<sup>5</sup> Opinion of the European Committee of the Regions: *Effective water management: approach in favour of innovative solutions*, 121<sup>st</sup> plenary session, 8–9.02.2017, ENVE-VI/-14, COR-2016-03691-00-00-AC-TRA (EN) 11/12.

<sup>6</sup> Albrecht, J., 'The Europeanization of water law by the Water Framework Directive: A second chance for water planning in Germany', *Land Use Policy*, 2013, No. 30/1, pp. 381–391; Blöch, H., 'European Water Policy and the Water Framework Directive: an overview', *Journal for European Environmental & Planning Law*, 2004, No. 31, pp. 170–178; Chase, P., *The EU Water Framework Directive. An Introduction*, IWA publishing, London, 2001; Correlje, A., François, D., Verbeke, T., 'Integrating water management and principles of policy: towards an EU framework', *Journal of Cleaner Production*, 2007, No. 15, pp. 1499–1506; Moss, B., 'The Water Framework Directive: total environment or political compromise', *Science of the Total Environment*, 2008, No. 400, pp. 32–41.

<sup>7</sup> Lieferink, D., Wiering, M., Uitenboogaart, Y., 'The EU Water Framework Directive...', op. cit., pp. 712–722; Albrecht, J., 'The Europeanization of water law...', op. cit., pp. 381–391; Blöch, H., 'European Water Policy...', op. cit., pp. 170–178; Lawrence, D., Kaminskaite-Salters, G., Mueller, H., 'A Challenging Road: implementing the Water Framework Directive in UK', *Journal for European Environmental & Planning Law*, 2004, No. 1(3), pp. 179–193; Hering, D., Borja, A., Carstensen, J., Carvalho, L., Elliot, M., Feld, C., Heiskanen, A.S., Johnson, R.K., Moe, J., Pond, D., Solheim, A.L., van Bund, W., 'The European Water Framework Directive at the age of 10: critical review of the achievements with recommendations for the future', *Science of Total Environment*, 2010, No. 408, pp. 4007–4019; Sobota, M., Jawecki, B., Feng, L., 'Charges for water services: legal and systemic concepts in the European Union (the example of Poland) and China', *Journal of Water Law*, 2021, No. 27(1), pp. 13–19.

and e) contribute to the reduction of the effects of floods and droughts (Article 1 of the WFD).

The research method used in this study is primarily based on the use of primary data, i.e., legislation that is developed both at Member States' and EU level, as well as secondary data, i.e., the one obtained from the interpretation of the legislation carried out in the framework of the case-law of the Court of Justice of the European Union (hereinafter: "CJEU") and the literature, in particular the European water legislation. Only after a sufficient amount of data has been collected, proper aggregation, comparison and summarisation is possible. Thus, the research method adopted involves the collection and initial selection of legislation, rulings, views of legal academics and commentators (the comparative method) and then the analysis of their content and development of research conclusions (the analytical method).

## 1. IMPLEMENTATION OF THE WFD

In accordance with Article 288 of the Treaty on the Functioning of the European Union<sup>8</sup> (hereinafter: "the TFEU"), a Directive is a source of law which is binding on each Member State to which it is addressed, in relation to the result to be achieved, but leaves national authorities the choice of form and means, and therefore the provisions of a Directive are implemented in the form determined by each Member State.<sup>9</sup> However, the rich case-law of the CJEU governs the principles of implementation, pointing out, inter alia, the need to implement a directive fully and effectively, in particular, to ensure that its provisions are exercised with respect to rights and obligations imposed, importantly, on both private and public entities.<sup>10</sup>

In the 1970s and 1980s an average of one in three directives was not transposed within the time specified.<sup>11</sup> The control of transposition into national law is based on the principle of primacy, which consists of the direct effect of directives, a conforming (pro-EU) interpretation of national law and the Member State's liability for damages.

As a general rule, the direct effect of directives is related to the relationship between the State and the individual (vertical nature). The direct effect of directives is not an alternative to the obligation to implement EU law, but it does allow, in

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<sup>8</sup> Treaty on the Functioning of the European Union (consolidated version) of 26.10.2012, OJ C 326, 26.10.2012, pp. 47–390.

<sup>9</sup> Kurcz, B., *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego*, Kraków, 2004, pp. 46; Maśnicki, J., 'Bezpośredni skutek dyrektyw relacjach triangularnych', *Europejski Przegląd Sądowy*, 2017, No. 3, pp. 4–12.

<sup>10</sup> Łętowska, E., 'Implementacyjne grzechy przeciw effet utile', *Europejski Przegląd Sądowy*, 2014, No. 1, p. 58; Prechal, S., *Directives in EC Law*, Oxford, 2005, p. 6; Klamert, M., 'Judicial implementation of directives and anticipatory indirect effect: connecting the dots', *Common Market Law Review*, 2006, No. 5(43), p. 1252; Becker, F., 'Application of community law by member states public authorities: Between autonomy and effectiveness', *Common Market Law Review*, 2005, No. 44 (4), pp. 875–1205.

<sup>11</sup> Haverland, M., Romeijn, M., 'Do Member States Make European Policies Work? Analysing the EU Transposition Deficit', *Public Administration*, 2007, No. 85(3), pp. 757–778.

some cases, to minimise the consequences of non-transposition.<sup>12</sup> However, the CJEU recognizes that the principle of direct effect applies in certain cases in order to protect the rights of individuals (horizontal nature), which may occur when provisions of a directive are unconditional and sufficiently clear and precise, moreover, if the Member State concerned has not transposed provisions of a directive within the deadline.<sup>13</sup>

The case-law of the CJEU also indicates how the principle of conforming interpretation of national law should be applied, i.e., both in the absence of incorporation of the provisions of a directive into national law and in the event of incorrect implementation of a directive. In such a case, entities applying the law (courts, public administrations) should take action which, however, complies as far as possible with provisions of a directive and its objectives, which in practice means prohibiting any action contrary to the rules of the specific directive.<sup>14</sup>

In addition, the case-law of the CJEU has established the principle of a Member State's liability for damages in the event of failure to implement provisions of a directive into national law. Compensation will be payable to private parties where a provision of a directive is intended to confer specific powers on them, and a Member State has failed to implement the provision within the time limit set by a directive, or has implemented it incorrectly, and there is a causal link between these circumstances (a Member State need not to be at fault), and the law of the country where infringements occur is applicable to pursue claims.<sup>15</sup>

The WFD is a framework issued on the basis of Article 192 of the TFEU. The common principles and general framework for action established by the Directive are to be developed subsequently by the Member States, which are to issue a set of special provisions within the time limit laid down in the Directive.<sup>16</sup> However, this

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<sup>12</sup> Becker, F., Campbell, A., 'The Direct Effect of European Directives – Towards the Final Act?', *Columbia Journal of European Law*, 2007, No. 13, p. 405; Skouris, V., 'Effet Utile Versus Legal Certainty: The Case-law of the Court of Justice on the Direct Effect of Directives', *European Business Law Review*, 2006, No. 17(2), p. 250; Judgement of the Court of Justice of 05.04.1979, in case C-148/78, *Ratti*, ECLI:EU:C:1979:110; Judgement of the Court of Justice of 26.02.1986, in case C-152/84 *Marshall* ECLI: ECLI:EU:C:1986:84.

<sup>13</sup> Weatherill, S., 'Breach of Directives and breach of contract', *European Law Review*, 2001, No. 26(2), p. 184; Colgan, D., 'Triangular Situations: The Coup de Grâce for the Denial of Horizontal Direct Effect of Community Directives', *European Public Law*, 2002, No. 8(4), p. 546; Lackhoff, K., Nyssens, N., 'Direct Effect of Directives in Triangular Situations', *European Law Review*, 1998, No. 23, p. 409; Judgement of the Court of Justice of 04.12.1974 *Yvonne van Duyn v Home Office*, ECLI: ECLI:EU:C:1974:133; Judgement of the Court of Justice of 18.12.1997, in case C-129/96, *Inter-Environnement Wallonie ASBL v Région wallonne*, para. 43, EU:C:1997:628; Judgement ECJ of 19.01.1982, *Ursula Becker v Finanzamt Münster-Innenstadt*, case C-8/81, EU:C:1982:7, para. 25; Opinion of the Advocate General Eleanor Sharpston of 12.10.2017, case C-664/15, *Protect Natur-Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, ECLI:EU:C:2017:760; Judgement ECJ of 01.07.2015, *Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland*, case C461/13, EU:C:2015:433.

<sup>14</sup> Judgement of the Court of Justice of 10.04.1984, in case C-14/83 *Von Colson*, ECLI:EU:C:1984:153.

<sup>15</sup> Judgement of the Court of Justice of 19.11.1991, in case C-6/90 and 9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, ECLI:EU:C:1991:428.

<sup>16</sup> Uitenboogaart, Y., van Kempen, J.H.J., Wiering, M., van Rijswijk, H.F.M.W., *Dealing with Complexity and Policy Discretion, the Implementation of the Water Framework Directive in Five Member*

directive does not aim at a complete harmonisation of the Member States' regulations in the field of waters. The CJEU has repeatedly pointed out in its rulings that the WFD is a framework directive that establishes common principles and a general framework for the protection of waters and is intended to ensure coordination, integration and, in the long term, the development of general principles and structures for the sustainable use of water in the EU.<sup>17</sup>

## 2. WATER SERVICES UNDER THE EUROPEAN WATER LEGISLATION

The WFD is comprehensive and detailed, which, however, results in a complex act containing numerous exceptions to the principles laid down, as well as references to other legal acts.<sup>18</sup> According to the WFD: "Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such" (recital 1 in the preamble to the WFD). The WFD also highlights that there are different conditions and needs in the various EU Member States, which require different specific solutions. This diversity should be taken into account when planning and implementing measures to ensure protection and sustainable use of water within the river basin. Decisions should be taken as close as possible to the point where water is exposed to adverse effects or use. Priority should be given to actions under the responsibility of individual Member States through the development of action programmes adapted to regional and local conditions (recital 19 in the preamble to the WFD).

The above concerns have certain legal consequences also with regard to water-pricing policies.<sup>19</sup>

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*States*, SDU Publishers, The Hague, 2009; Moss, T., 'The governance of land use in river basins: prospects for overcoming problems of institutional interplay with the EU Water Framework Directive', *Land Use Policy*, 2004, No. 21(1), pp. 85–94; Knill, C., Lenschow, A., *Implementing EU Environmental Policy: New Directions and Old Problems*, Manchester, 2000; Mosert, E., 'Law and Politics in River Basin Management: The Implementation of the Water Framework Directive in The Netherlands', *Water*, 2020, No. 12(12), p. 3367.

<sup>17</sup> Judgement ECJ of 30.11.2006, *Commission v Luxembourg*, case C32/05, ECLI:EU:C:2006:749, para. 41; Judgement ECJ of 09.11.1999, *Commission of the European Communities v Italy* (also called "San Rocco"), case C-365/97, ECLI:EU:C:1999:544, para. 67 and 68; Judgement ECJ of 18.06.2002, *Commission of the European Communities v France*, case C-60/01, EU:C:2002:383, para. 27; Judgement ECJ of 11.09.2014, *European Commission v Germany*, case C-525/12, ECLI:EU:C:2014:2202, para. 50.

<sup>18</sup> Josefsson, H., Baaner, L., 'The Water Framework Directive: A Directive for the Twenty-First Century?', *Journal of Environmental Law*, 2011, No. 23(3), p. 463; Irvine, K., 'Classifying ecological status under the European Water Framework Directive: the need for monitoring to account for natural variability', *Aquatic Conservation: Marine and Freshwater Ecosystems*, 2004, No. 14(2), p. 107; Szöllös, A., 'The enforcement of the European Union environmental law in the mirror of the judicial practice of the Court of Justice of the European Union', *Journal of Agricultural and Environmental Law*, 2020, No. 28, pp. 402–418; Thieffry, P., 'Le nouveau cadre de la politique communautaire de l'eau', *Europe*, 2001, No. 2, p. 4.

<sup>19</sup> Howarth, W., 'Cost recovery for water services and the polluter pays principle', *ERA Forum* 10, 2009; Rotko, J., 'Zasada zwrotu kosztów usług wodnych i jej znaczenie prawne', *Studia Prawnicze*, 2016, No. 2(206), pp. 123–136; Unnerstall, H., 'The principle of full cost recovery in the EU Water Framework Directive – genesis and content', *Journal of Environmental Law*, 2007, No. 19(1), pp. 29–42.

According to Article 2(38) of the WFD, ‘water services’ mean all services which provide for households, public institutions or any economic activity: (a) abstraction, impoundment, storage, treatment and distribution of surface water or groundwater, (b) waste-water collection and treatment facilities which is subsequently discharge into surface water. Therefore, the WFD defines water services in view of the two main activities necessary for the use of water, in the first phase, the supply of water and in the second phase, the treatment of waste-water. The term ‘service’ should be understood as referring to the activities offered by the supplier to all types of recipients, whether households, public bodies, agricultural or industrial operators.<sup>20</sup>

The above dictates that we first consider the scope of the word used in the WFD: ‘service’ because the definitions formed in Article 2 of the WFD are intended to serve the effective implementation of the objectives of the WFD in the individual Member States. Helpful in this respect are the rules of interpretation developed in the case-law of the CJEU, which emphasise that the interpretation of concepts and definitions contained in directives should be based on a common denominator for all Member States, which is the ordinary meaning of the concepts used. The above assertion of the CJEU was derived from the principle of legal certainty, which assumes that the EU regulation should allow the interested parties to know the exact scope of the obligations it imposes on them. Furthermore, the CJEU has also emphasised that where there are clear, transparent and unambiguous terms in a legal act, which are further shaped by the scheme of a legal act, such terms cannot be interpreted in a way that leads to an extension of the Member States’ obligations under those terms.<sup>21</sup> On the other hand, if doubts arise as to the interpretation of the meaning of a provision of EU law, both its wording, context and the purpose pursued by the regulation in question should be taken into account.<sup>22</sup> Moreover, as the case law of the CJEU indicates, the very genesis of the inclusion of a given provision in a legal act may also contain elements relevant to its interpretation.<sup>23</sup>

In view of the above rules of interpretation formulated by the case law of the CJEU, it is reasonable to first provide a literal interpretation of the term ‘service’ as used by the WFD. It should be noted that in different language versions of Article 2(38) of the WFD, the meaning of this word is different. In the French version of the WFD, the term ‘services’ includes the activities (‘couvrent’) listed in paragraphs 38(a) and 38(b) of the WFD, which does not refer directly to the provision of services to the recipient, while the wording in Spanish ‘en beneficio de’,

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<sup>20</sup> Opinion of Advocate General Nii Jääskinen of 22.05.2014, case C-525/12, *European Commission v Federal Republic of Germany*, ECLI:EU:C:2014:449, para. 50.

<sup>21</sup> Judgement ECJ of 15.07.2010, *European Commission v United Kingdom od Great Britain and Northern Ireland*, case C-582/08, ECLI:EU:C:2010:429, para. 135.

<sup>22</sup> Judgement ECJ of 29.10.2009, *NCC Construction Danmark A/S v Skatteministeriet*, case C-174/08, EU:C:2009:669, para. 23; Judgement ECJ of 09.04.2013, *European Commission v Ireland*, case C85/11, EU:C:2013:217, para. 35; Judgement ECJ of 03.10.2013, *Criminal process against Daniel Lundberg*, case C317/12, EU:C:2013:631, para. 19; Judgement ECJ of 14.11.2013, *SFIR and others*, cases C187/12 – C189/12, EU:C:2013:737, para. 24; Judgement ECJ of 12.02.2015, *Theodor Hendrik Bouman v Rijksdienst voor Pensioenen*, case C114/13, EU:C:2015:81, para. 31.

<sup>23</sup> Judgement ECJ of 27.11.2012 *Thomas Pringle v Government of Ireland*, case C-370/12, EU:C:2012:756, para. 135.

in German 'zur Verfügung stellen', in English 'provide', in Italian 'che forniscono', in Lithuanian 'teikiamos', in Polish 'umożliwiają', in Finnish 'tarjoavat' and in Swedish 'tillhandahåller', indicates that the emphasis is on the fact of offering or providing to the recipient the activities listed in Art. 2(38)(a) and (b) of the WFD, which dictates that the legislative intention was to establish a clear requirement for a bilateral relationship in which a party provides a service to the other party. This understanding of the concept of 'services' is also confirmed by the link between Article 2(38) of the WFD and Article 57 of the TFEU, where it is indicated that 'services' is a bilateral legal relationship. Therefore, it is not present, i.e., in the case of the use of water for navigation or flood protection measures, while on the other hand, it is found in the case of water supply or sewage treatment activities.<sup>24</sup>

On the basis of the above literal interpretation, it is possible to assume that the scope of water services covers only activities strictly connected with water supply and sewage disposal (the so-called narrow definition of water services) or, within the so-called broad definition of water services, to assume that they may also cover 'related' services, e.g. impoundment for the purposes of navigation, hydroelectric power generation, navigation and flood protection, abstraction for the purposes of irrigation and for industrial purposes. It is up to the Member States of the European Union to take a sovereign decision in this respect and thus to decide to which extent Article 2(38) of the WFD should be transposed into their national legal order.<sup>25</sup> However, the compliance of the actions of Member States' authorities with the systemic assumptions set out in the WFD, i.e., the principle of cost recovery and the polluter pays principle, remains an important aspect.

### 3. THE PRINCIPLE OF COST RECOVERY AND THE POLLUTER-PAYS PRINCIPLE

Article 9(1) of the WFD emphasises that the Member States shall take account of the principle of recovery of the costs for water services, including environmental and material costs, having regard to the economic analysis carried out in accordance with Annex III, and in particular in accordance with the polluter-pays principle, and that it is therefore for the Member States to take measures to ensure that water charging policies encourage users to use resources efficiently and in this way to contribute to the achievement of the environmental objectives of the WFD.<sup>26</sup> The legislator

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<sup>24</sup> Opinion of Advocate General Niil Jääskinen of 22.05.2014, case C-525/12 *European Commission v Federal Republic of Germany*, ECLI: ECLI:EU:C:2014:449, para. 50.

<sup>25</sup> Unnerstall, H., 'Kostendeckung für Wasserdienstleistungen nach Art. 9 EG-Wasserrahmenrichtlinie', *Zeitschrift für Umweltrecht (ZUR)*, 2009, No. 5; WATECO (CIS Working Group 2.6 on Water and Economics), Economics and Environment – The Implementation Challenge of the Water Frame Directive, Guidance Document and Annexes (2002), Annex IV.40.

<sup>26</sup> Gawel, E., 'ECJ on Cost Recovery for Water Services under Article 9 of the Water Framework Directive: Camera Locuta Causa non Finita', *Journal for European Environmental & Planning Law*, 2015, No. 12, pp. 71–79; Lindhout, P.E., 'A wider notion of the scope of water services in eu water law, Boosting payment for water related ecosystem services to ensure sustainable water management?', *Utrecht Law Review*, 2012, No. 8(3), pp. 86–101.

used the phrase 'shall take into account', and thus part of legal academics and commentators highlight that this is not a provision establishing a typical obligation, but it has an initiating and announcing function, as it is only a general introduction to the provisions defining the specific functions of that principle.

The scope of Article 2(38)(a) and (b) of the WFD in conjunction with Article 9(1) of the WFD, i.e., whether all water services should be charged for or whether it is up to the Member State to choose, is an issue that was already controversial at the time of drafting the WFD. On the one hand, on the basis of historical interpretation, it should be pointed out that the European Commission, as early as the drafting of the WFD, highlighted that the act should aim to establish a Community framework for the protection of waters according to a common approach, pursuing common objectives, on the basis of common principles and actions. And so, the Commission defended a full cost recovery approach, in the sense that all costs of all water services should be fully recovered, taking into account all users in each economic sector.<sup>27</sup> On the other hand, we cannot disregard the fact that the position of the Council of the European Union emphasised that a Member State decides on the basis of its economic analysis, which measures are to be covered by the principle of cost recovery.<sup>28</sup>

The above dualism arose because the provisions of the WFD do not contain a legal definition of the term 'services' and it is therefore impossible to state clearly whether the EU legislator intended to include in the principle of cost recovery all water services connected with each of the activities listed in Article 2(38)(a) and (b) of the WFD or whether it left the Member States a certain discretion in that regard on the basis of Article 9(1) of the WFD (cost recovery in accordance with the polluter pays principle, taking into account environmental and material costs). At the same time, it is worth noting the interesting view presented in literature by Erik Gawel, who argues that a strict interpretation of taking into account environmental and resource (material) costs is not justified under Article 9 of the WFD. Moreover, such an interpretation – in this author's opinion – may even be counter-productive to the legislator's intention in terms of the practical application of water protection.<sup>29</sup> Erik Gawel presents nine arguments against focusing on calculating environmental and material costs referred to in Article 9 of the WFD when determining the context for the application of the cost recovery policy, i.e.:

1. Environmental and resource costs cannot be calculated.
2. There is more to taking account of environmental and resource costs than identifying formal cost recovery levels.
3. Calculation problems give rise to dubious derivative concepts.

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<sup>27</sup> Proposal for a Council Directive, COM(97) 49 final, p. 21.

<sup>28</sup> Common Position (EC) No 41/1999 of 22 October 1999, adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive of the European Parliament and of the Council establishing a framework for Community action in the field of water policy (OJ C 343, 30.11.1999, p. 1).

<sup>29</sup> Gawel, E., 'Article 9 Water Frame Directive: Do We Really Need to Calculate Environmental and Resource Costs?', *UFZ Discussion Papers Department of Economics*, May 2014, No. 13, Helmholtz Zentrum für Umweltforschung UFZ.



4. There is no legal obligation to provide a calculation solution.
5. Environmental economics does not necessarily support calculation approaches.
6. Calculation approaches are costly and time consuming.
7. Calculation approaches distract from the real challenges.
8. Calculation approaches are not required from a conceptual point of view.
9. Calculation approaches weaken the political legitimization of cost recovery policy.

This author, above all, from an economic point of view, highlights that the phrase ‘taking account of’ used in Article 9 of the WFD means the same as ‘calculating’ and, as a consequence, may lead to the fact that in practice it will not be possible to take this quantifier into account due to its ambiguity on the ground of economic theories of environmental policy. Gawel points out that taking only material and environmental costs into account when implementing the principle of cost recovery in accordance with the polluter pays principle can never provide a satisfactory result because, in any specific situation, which a Member State will have to consider when establishing national law, factors which – from the point of view of environmental protection – are not measurable must also be taken into account. An important argument raised by Gawel is that under Article 9(1) of the WFD, the Member States are not legally obliged to provide an estimated solution to settle environmental and resource costs, as Article 9 of the WFD provides the Member States with discretion in the choice of methods and instruments when implementing the Directive. However, this does not change the fact that the Member States are obliged to report, document and justify their actions (Article 9(2); (4), sentence 2, of the WFD), and details of what an economic analysis for the implementation of the cost recovery principle should contain are set out in Annex III of the WFD.

On the other hand, another view is that minimum requirements for such a principle should be set under a correctly applied principle of administrative discretion. Thus, the principle under Article 9(1) of the WFD will be violated when the action taken totally disregards the demand expressed therein in an unjustified manner or pursues it by indisputably inappropriate means.<sup>30</sup>

## CONCLUSIONS

Practice to date has shown that the interpretation of the provisions of the WFD concerning the polluter-pays principle, i.e. whether the Member States are entitled to exclude certain services from the scope of Article 2(38) of the WFD, e.g. because of differences between the Member States in access to water and in the capacity of the population to be supplied with water, or due to the geographical and climatic conditions of different regions, or finally because of different economic approaches to water management, has remained a contentious issue.

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<sup>30</sup> Lindhout, P.E., van Rijswijk, H.F.M.W., ‘Effectiveness of the Principle of Recovery of the Costs of Water Services Jeopardized by the European Court of Justice – Annotations on the Judgment in C-525/12’, *Journal for European Environmental & Planning Law*, 2015, No. 12, pp. 80–94.

The WFD highlights that there are diverse conditions and needs in the EU that require different specific solutions. This diversity should be taken into account when planning and implementing measures to ensure protection and sustainable use of water within the river basin. Decisions should be taken as close as possible to the point where water is exposed to adverse effects or use. Priority should be given to actions under the responsibility of the individual Member States through the development of action programs adapted to regional and local conditions (recital 13 in the preamble to the WFD).

In view of the above circumstances, it remains reasonable to accept the thesis that the WFD sets out a new methodology for water management, covering not only the level of planning, but also the level of achieving binding environmental objectives. It is expressed in the adoption of concrete measures to guarantee good water status and avoid deterioration of water status (contrary to the thesis that the WFD is only a large-scale planning instrument for water management).<sup>31</sup>

In this context, Article 9 of the WFD stipulates that the Member States shall take account of the principle of recovery of the costs of water services, including environmental and resource costs, in the light of an economic analysis carried out under Annex III to the Directive and in particular according to the polluter-pays principle. It is up to the Member States to ensure that water pricing policy encourages users to use water resources efficiently and that it contributes to achieving the environmental objectives set out in the WFD. The position of the CJEU in its judgment of 07 December 2016 *Vodoopskrba i odvodnja d.o.o. v Željce Klafurić*, Case C-686/15 is worth mentioning. The judgment defines the scope of Member States' discretion on how to determine the charges for the supply of water to consumers (whether to pay for actual consumption according to a water meter reading or whether other charges or fees can also be charged). The CJEU pointed out that the choice of measures to achieve the stated objective of ensuring that pricing policies encourage users to use water resources efficiently was therefore left to the Member States. In this perspective, it is undisputable that pricing water services on the basis of the volume of water consumed is one of the measures that can encourage users to use water resources in an efficient manner.<sup>32</sup>

The discussion on creating the foundations for an effective cost recovery policy has been going on among lawyers and economists dealing with the subject of environmental protection for over one hundred years, and when translated into the WFD implementation practice it may determine that there is no basis for solving this problem both at present and in the future.<sup>33</sup> The phrase used in Article 9(1) of the WFD: "Member States *shall take account* of the principle of recovery of the costs of water services, including environmental and material costs...", is vague and interpreted by the Member States through the prism of their current environmental policy at a national level, and may be tailored to current political or fiscal objectives.

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<sup>31</sup> Opinion of the Advocate General Niil Jääskinen of 23.10.2014, case C-461/13, *Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland*, ECLI:EU:C:2014:2324.

<sup>32</sup> Judgement of ECJ of 07.12.2016, *Vodoopskrba i odvodnja d.o.o. v Željce Klafurić*, case C-686/15, ECLI:EU:C:2016:927.

<sup>33</sup> Gawel, E., 'Article 9 Water Frame Directive: Do We Really Need To Calculate...', op. cit.

In this view, it is a mistake for the EU legislator to avoid clear definitions in the EU legislation on the subject.

As highlighted above, the WFD is a framework directive, which on the one hand means that the Member States have discretion in choosing an appropriate cost recovery policy and the polluter pays principle, but not a discretion without a legal framework. The author supports the arguments presented in the Opinion of Advocate General Niilo Jääskinen of 22<sup>nd</sup> May 2014 regarding Case C-525/12 *European Commission v Federal Republic of Germany*, in which the European Commission claims that the CJEU should declare that the Federal Republic of Germany has failed to fulfil its obligations under the WFD, in particular under Article 2(38) and Article 9 thereof, by excluding certain services (for example, impoundment for the purposes of hydroelectric power generation, navigation and flood protection, abstraction for the purposes of irrigation and for industrial purposes, as well as personal consumption) from the concept of 'water services'.<sup>34</sup> Following the Advocate General's opinion, it is for the Member States to take measures primarily from the point of view of efficiency as compared with their national system of water management, and in that regard to take account of specific regional, social, environmental and economic conditions, enjoying a broad discretion. The framework for action by the individual Member States should not be standardised in view of the fact that, in all Member States, water resources are largely in the public domain, which would allow the State to impose prices for water uses such as personal consumption or production of hydroelectricity. On the other hand, in all Member States, the environmental targets adopted under environmental policy justify encouraging sparing use of freshwater in the context of water supply. In other words, the obligation to recover the costs of water services cannot be a central, identical instrument for all Member States and thus a means of resolving water management problems. Instead, it is a specific instrument to be applied to water supply and waste-water collection and treatment in the individual Member States, taking into account local conditions. The latter cannot be a top-down, superior regulation because it would promote a purely quantitative approach, which would not be justified in the Member States with significant water resources. Under current law, there is a need to emphasise the protection of water quality and to ensure the sustainable management of the annual hydrological cycle in order to avoid large water level fluctuations in the water masses constituting the integrated hydrological system.

Thus, it must be assumed that the provisions of the WFD require the Member States to take the necessary measures to achieve the objectives formulated in general and not in numerical terms, leaving the Member States some discretion as to the nature of the measures to be taken. However, the WFD does not aim at a complete harmonisation of Member States' water regulations and therefore assumes a complementary nature of charging.<sup>35</sup> Complementarity in this respect lies in the recognition of charges for water services as one of the elements of a Member State's system of water protection.

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<sup>34</sup> Opinion of Advocate General Niilo Jääskinen of 22.05.2014, case C-525/12, *European Commission v Federal Republic of Germany*, ECLI: ECLI:EU:C:2014:449, para. 50.

<sup>35</sup> Judgement ECJ of 30.11.2006, *Commission v Luxembourg*, case C32/05, ECLI:EU:C:2006:749, para. 41; Judgement ECJ of 18.06.2002, *Commission of the European Communities v France*, case

It also implies that while the principle of cost recovery and the polluter-pays principle must be implemented through a pricing system for water services, charges are not necessarily the only way in which these principles are implemented in Member States' domestic legal systems. In other words, the implementation of the principle of cost recovery through charges for water services is rather a specific instrument to be used primarily for water supply and waste-water collection and treatment. According to the WFD, this instrument serves to stimulate greater economy and prudence in water management, and the limits of interpretation in this respect at a Member State level consequently determine which activities a Member State shall exclude from water services and thus the principles of cost recovery, which involves the non-charging of such activities. These measures are taken on the basis of an analysis of regional, environmental, geographical, social and economic conditions by the Member States.

The above statements seem to be confirmed by the WFD, recital 13 in the preamble to the WFD states as follows: *"There are diverse conditions and needs in the Community which require different specific solutions. This diversity should be taken into account when planning and execution of measures to ensure protection and sustainable use of water in the framework of the river basin. Decisions should be taken as close as possible to the point where water is exposed to adverse effects or use. Priority should be given to action within the responsibility of Member States through the drawing up of programmes of measures adjusted to regional and local conditions."*

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## EUROPEAN PRICING SYSTEM FOR WATER SERVICES AS AN INSTRUMENT FOR SHAPING THE PRINCIPLE OF COST RECOVERY AND THE POLLUTER PAYS PRINCIPLE

### Summary

The entry into force of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy has introduced a new pricing system for water services. The Directive identifies the polluter-pays principle and the principle of cost recovery as a basis for action to be taken by the Member States when setting up pricing systems for water services. The provisions of Article 2(38) and Article 9 of the Directive raised questions of interpretation. The research issue of this study is to determine the discretionary scope of the Member States of the European Union for the protection of waters under a pricing system for water services, and to interpret the concept of "services" used in the Directive in the context of the cost recovery principle and the polluter-pays principle. The author, on the basis of the adopted research method, i.e., interpretation of law, views of legal academics and commentators, case-law of the Court of Justice of the European Union, states that the Directive provides for a mechanism whereby each EU Member State determines the individual uses of water in a pricing system for water services on the basis of a country-specific definition of "water services". The pricing system for water services is only one of the legal instruments for setting the principle of cost recovery and the polluter-pays principle in the Member States' water management system, and its scope is based on geographical, economic and natural criteria.

Keywords: Water Framework Directive, water services, polluter pays principle, principle of cost recovery

## EUROPEJSKI SYSTEM OPŁAT ZA USŁUGI WODNE JAKO INSTRUMENT KSZTAŁTOWANIA ZASADY ZWROTU KOSZTÓW I ZASADY „ZANIECZYSZCZAJĄCY PŁACI”

### Streszczenie

Wejście w życie Dyrektywy 2000/60/WE Parlamentu Europejskiego i Rady z dnia 23 października 2000 r. ustanawiającej ramy wspólnotowego działania w dziedzinie polityki wodnej wprowadziło nowy system opłat za usługi wodne. Wskazane tam zostały zasady: „zanieczyszczający płaci” oraz zasada zwrotu kosztów jako podstawy działań podejmowanych przez państwa członkowskie w ramach tworzonych systemów opłat za usługi wodne. Wątpliwości interpretacyjne budziły uregulowania zawarte w art. 2 pkt 38 oraz art. 9 dyrektywy. Problemami badawczymi niniejszego opracowania pozostają: określenie, jak szeroki jest margines swobodnych działań państw członkowskich Unii Europejskiej w celu ochrony wód w ramach systemu opłat za usługi wodne, a także dokonanie wykładni użytego w dyrektywie pojęcia „usługi” w kontekście zasady zwrotu kosztów oraz zasady „zanieczyszczający płaci”. Autor, na podstawie przyjętej metody badawczej, czyli wykładni prawa, poglądów doktryny, orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej, formułuje tezę, że dyrektywa przewiduje mechanizm, według którego to każde państwo członkowskie Unii Europejskiej określa indywidualne sposoby korzystania z wód w systemie opłat za usługi wodne na bazie przyjętej w danym państwie definicji „usług wodnych”. System opłat za usługi wodne stanowi jedynie jeden z instrumentów prawnych kształtowania zasady zwrotu kosztów i zasady „zanieczyszczający płaci” w systemie gospodarowania wodami w państwach członkowskich, zaś zakres jego kształtowania odbywa się na podstawie kryteriów geograficznych, ekonomicznych, przyrodniczych.

Słowa kluczowe: ramowa dyrektywa wodna, usługi wodne, zasada „zanieczyszczający płaci”, zasada zwrotu kosztów

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